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**DEC 19 1996**

December 19, 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: In the Matter of Federal-State Joint Board on Universal Service,  
CC Docket No. 96-45

Dear Mr. Caton:

Enclosed are an original and four copies of the Comments of the  
Ad Hoc Telecommunications Users Committee in the above-captioned matter.  
Please date stamp the additional copy and return it with our messenger.

If you have any questions regarding this filing, please do not  
hesitate to call.

Sincerely,



Kevin S. DiLallo

Enclosures

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Federal-State Joint Board on )  
Universal Service )  
\_\_\_\_\_ )

CC Docket No. 96-45

**COMMENTS OF THE AD HOC  
TELECOMMUNICATIONS USERS COMMITTEE**

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December 19, 1996

## SUMMARY

The Ad Hoc Telecommunications Users Committee advocates a universal service support system that is properly sized, economically efficient, and pro-competitive. Ad Hoc urges the Commission to adopt the Joint Board's recommendations with certain clarifications and modifications.

The Commission should adopt the core services as recommended by the Joint Board, with two exceptions: Universal service support should not extend to access to directory assistance to the extent directory assistance provides information readily available through the telephone book, and access to interstate services should be included, but only on an "equal access" basis.

Ad Hoc also supports the Joint Board's recommendation of a forward-looking economic cost proxy model, but believes the current proxy models before the Commission are flawed and must be readjusted to ensure that the ultimately adopted model complies with the Joint Board's recommended criteria and the competitive neutrality principles underlying the Telecommunications Act of 1996. Presently, there is insufficient information about the competing models to enable commenters to make well-informed judgments about the relative merits of each model. The Commission should therefore provide for a comment period following the cost proxy workshops scheduled for January, 1997, to enable interested parties to comment on information that comes to light during those workshops.

The revenue-based benchmark for the model should include revenues from all services linked to residential access lines, including yellow pages revenues.

The Commission should clarify that neither private carriers who do not also provide services on a common carrier basis, nor entities solely participating in sharing arrangements, are subject to the universal service support requirements. These clarifications are consistent with Congress's definition of "telecommunications service" and the Commission's and common law's traditional distinctions between common carriers and private carriers, providers and users of telecommunications services. The Joint Board has advanced no – and indeed there is no -- public policy rationale for imposing universal service support obligations on non-common carriers.

Although the Joint Board's decision to recover the Carrier Common Line Charge ("CCLC") on a flat rate basis is a substantial improvement over the present usage-sensitive CCLC, Ad Hoc advocates eliminating the CCLC altogether and shifting revenue responsibility, if necessary, to the SLC, rather than reducing the SLC. Ad Hoc expects, however, that the use of a forward-looking cost proxy model may enable the Commission to eliminate the CCLC without increasing the SLC. These proposals are consistent with principles of economic efficiency and pro-competitiveness heralded by Congress. Ad Hoc fully supports the Joint Board's recommendation to sever Long Term Support charges from access charges.

Finally, Ad Hoc supports a cap on school and library discounts recommended by the Joint Board, but urges the Commission to clarify how the funding will be distributed among entities and services. Well-established economic and public policy applications confirm the cost-effectiveness of targeted subsidies.

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Federal-State Joint Board on  
Universal Service \_\_\_\_\_

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**COMMENTS OF AD HOC  
TELECOMMUNICATIONS USERS COMMITTEE**

The Ad Hoc Telecommunications Users Committee ("Ad Hoc") submits these Comments in response to the FCC's November 18, 1996 Public Notice<sup>1</sup> inviting comments on the Federal-State Joint Board's Recommended Decision<sup>2</sup> ("Recommended Decision") in this docket.

**INTRODUCTION**

Ad Hoc's members are high-volume business users of telecommunications services and facilities who desire to promote the availability of high quality telecommunications services and facilities at reasonable prices. To that end, Ad Hoc consistently has supported universal service subsidies so long as those subsidies are properly sized, allocated, collected and distributed in an economically efficient, pro-competitive manner. Ad Hoc has a vital interest in the development of competitive markets for telecommunications services

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<sup>1</sup> Public Notice, DA-96-1891 (released November 18, 1996).

<sup>2</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, FCC 96J-3 (released November 8, 1996) ("Recommended Decision").



wherever possible, because competitive markets produce cost-based rates and superior products and services.

The Joint Board's Recommended Decision takes a significant step toward a long-term solution for overhauling a universal service support system replete with hidden subsidies that distort pricing and impede the development of competition. Ad Hoc therefore urges the Commission to adopt the Joint Board's recommendations discussed below, with the clarifications and modifications noted.

**I. THE COMMISSION SHOULD ADOPT MOST, BUT NOT ALL, OF THE JOINT BOARD'S RECOMMENDATIONS ON THE SERVICES TO BE SUPPORTED BY FEDERAL UNIVERSAL SERVICE SUPPORT MECHANISMS.**

In the Recommended Decision, the Joint Board proposes that the services that should be eligible for universal service support include voice grade, touch tone, single party access to the public switched network, and access to emergency, operator, directory assistance, and interexchange services.<sup>3</sup> Ad Hoc endorsed the proposal in the Notice of Proposed Rulemaking ("NPRM") in this proceeding<sup>4</sup> that the services eligible for support be limited to voice grade, touch tone, single party access to the public switched network, and access to emergency and operator services.<sup>5</sup>

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<sup>3</sup> Recommended Decision at ¶ 46.

<sup>4</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking and Order Establishing Joint Board, FCC 96-93 (released March 8, 1996) ("NPRM").

<sup>5</sup> Ad Hoc Comments in CC Dkt. 96-45 (filed April 12, 1996) ("Ad Hoc Comments"), pp. 6-7.

While Ad Hoc did not previously advocate supporting access to either directory assistance or interexchange service with universal service subsidies, Ad Hoc now agrees that such access should be included among the supportable core services, with some clarifications. Ad Hoc believes that access to directory assistance satisfies Section 254(c)(1)'s criteria for supportable services, but only to extent it provides information that is not available through another ubiquitously available source –the telephone book.<sup>6</sup> The record on this proceeding fails to demonstrate how access to directory assistance for purposes of locating otherwise readily available telephone information is either essential to the public health and safety or consistent with the public interest, convenience and necessity. Such access should therefore be excluded as a core service.

Similarly, Ad Hoc now agrees that access to interexchange services should be included as a supportable core service, particularly given Congress's declaration in Section 254(b)(3) of the Telecommunications Act of 1996 ("1996 Act")<sup>7</sup> that "[c]onsumers in all regions of the Nation . . . should have access to telecommunications and information services, including interexchange services." 47 U.S.C. § 254(b)(3). This access, however, should be provided on an "equal access" basis, notwithstanding the Joint Board's contrary recommendation.<sup>8</sup>

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<sup>6</sup> 47 U.S.C. § 254(c)(1).

<sup>7</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified at 47 U.S.C. Section 151 *et. seq.*) ("1996 Act").

<sup>8</sup> Recommended Decision at ¶ 66.

Congress has expressed its intent that the universal service support program be administered in a competitively neutral manner;<sup>9</sup> and the Joint Board has recommended adding competitive neutrality to the principles on which universal service policies are to be based.<sup>10</sup> In light of the emphasis on this principle, Ad Hoc urges the Commission to include only access to interexchange services among the supportable services if equal access is required to be offered to competing long distance service providers.<sup>11</sup>

The Joint Board's brief justification for not requiring equal access to interexchange services -- that such a requirement would impose significant costs on wireless services providers seeking to provide local service<sup>12</sup> -- is unpersuasive. First, the Joint Board's failure to quantify these alleged costs makes it impossible to comment constructively on the weight of the Joint Board's argument. Second, the paucity of supporting documentation in this regard should be weighed against the considerable history of policies promoting equal access.<sup>13</sup> Under this analysis, the benefits of equal access would almost

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<sup>9</sup> S. Rep. No. 230, 104<sup>th</sup> Cong., 2d Sess. 131 (1996) ("Joint Explanatory Statement"), at 113.

<sup>10</sup> Recommended Decision at ¶¶ 3, 23.

<sup>11</sup> While Congress did not explicitly require competitive neutrality throughout Section 254, the Commission, in the NPRM, noted that "a fundamental underlying principle of the 1996 Act is the Congressional desire "to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans." NPRM at ¶ 8, *citing* S. Conf. Rep. No. 104-230, 104<sup>th</sup> Cong., 2d Sess. 1 (1996).

<sup>12</sup> Recommended Decision at ¶ 66.

<sup>13</sup> See, e.g., *U.S. v. AT&T*, 552 F. Supp. 131, 195-200 (D.D.C. 1984, *aff'd sub nom. Maryland v. U.S.*, 460 U.S. 1001 (1983); *U.S. v. GTE Corp.*, 603 F. Supp. 730, 743-746 (D.D.C.

certainly outweigh the claimed costs. Fundamentally, the costs to wireless services providers of requiring equal access must be weighed against the cost to consumers of not requiring it. In this regard, Ad Hoc submits that the certain harm to interexchange competition (and thus to consumers) outweighs the more uncertain costs to wireless services providers.<sup>14</sup>

Not only would consumers be harmed by reduced competition in the interexchange services market, but the potential for vertical integration by carriers who provide wireless, local and interexchange services to leverage market share in one market and therefore gain a competitive advantage in other markets, poses an additional concern. At least one cellular carrier in each market is owned by the ILEC in that market, and the competitive cellular provider in many markets is at least partially owned by a major IXC. Thus, the threat of anti-competitive vertical integration is very real.

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1984); *MTS and WATS Market Structure*, Phase III, 100 F.C.C.2d 860 (1985); *Amendment of § 64.702 of the Commission's Rules (Second Computer Inquiry)*, 84 F.C.C.2d 50, 81-83 (1980); *Specialized Common Carrier Services*, 29 F.C.C.2d 870, 940 (1971) (FCC will not condone carriers with monopoly control over facilities showing favoritism among competitive carriers); *Specialized Common Carrier Services*, 24 F.C.C.2d 318, 347 (1970) (Same).

<sup>14</sup> Section 332(c)(8) of the Communications Act of 1934, as amended, provides in part that a CMRS provider "shall not be required to provide equal access to common carriers for the provision of telephone toll services." 47 U.S.C. § 332(c)(8). To the extent the Commission concludes that Section 332(c)(8) precludes the Commission from requiring commercial mobile services providers from providing equal access to common carriers, the Commission may waive the equal access requirement for these providers only. The Commission should, however, make it clear that subscribers to commercial mobile services who are denied access to the IXC of their choice may have a statutory remedy: Section 332(c)(8) requires the Commission to prescribe regulations to afford such subscribers unblocked access to the IXC of their choice if the Commission determines that denial of such access "is contrary to the public interest, convenience and necessity." 47 U.S.C. § 332(c)(8); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Dkt. No. 94-54, FCC 96-126 (released March 22, 1996). In short, the Commission should take all steps possible to allow consumers to choose their own IXC.

**II. THE COMMISSION SHOULD ADOPT A FORWARD-LOOKING COST PROXY MODEL AND A PROPERLY INCLUSIVE REVENUE BENCHMARK, BUT SHOULD TAKE FURTHER COMMENT ON WHICH MODEL IT SHOULD USE.**

The Joint Board advocates a forward-looking economic cost methodology to determine the level of universal service support. The Joint Board reasons that this methodology will “best approximate the costs that would be incurred by an efficient competitor entering the market” and that universal service support “should not be used to offset the costs of inefficient provision of services” or costs excluded from the definition of universal service.<sup>15</sup> Ad Hoc endorses these findings with some clarification.

**A. While We Have Insufficient Information To Endorse Any Of The Proposed Cost Proxy Models, The Reasonableness Of The Model Must Be Diligently Monitored To Avoid A Model That Supports Unjustifiably Excessive And Anti-Competitive Levels Of Support.**

The Joint Board outlines eight criteria the Commission should use to evaluate the reasonableness of any cost proxy model designed to estimate the forward-looking economic cost of providing the supported services and to calculate the required universal service subsidy.<sup>16</sup> These criteria provide sound principles to guide the Commission's determinations, and, if diligently applied, should result in the adoption of a cost proxy model that is capable of achieving the Act's stated goals.

The Joint Board's third criterion is particularly important: it establishes the threshold requirement that only forward-looking (*i.e.*, not embedded) costs of

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<sup>15</sup> Recommended Decision at ¶ 270.

<sup>16</sup> *Id.* at ¶ 277.

facilities, functions, or elements be included in the cost proxy model. The recovery of embedded costs by incumbent local exchange carriers ("ILECs") is wholly inconsistent with the competitive neutrality objectives of the Act for several reasons.<sup>17</sup>

First, embedded costs incorporate past engineering and acquisition decisions which, in light of the recent trend of significant technological changes, will likely have little relevance in the current and future market environment.<sup>18</sup> Second, embedded costs are distorted and bloated by capital investment decisions that were either made by ILECs under rate-of-return regulation and/or motivated by ILEC business strategies that focused on providing advanced digital services rather than achieving universal service objectives.<sup>19</sup> Finally, lasting, meaningful competition cannot reasonably be expected to develop if ILECs extract a federally mandated subsidy that effectively insures them against potential future competitive losses by guaranteeing full recovery of their embedded costs. And in any event, real competition in local exchange and exchange access markets will

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<sup>17</sup> See Joint Explanatory Statement at 113; Recommended Decision at ¶¶ 3, 23.

<sup>18</sup> See Lee L. Selwyn and Patricia Kravtin, *Analysis of Incumbent LECs: An Empirical Perspective on the "Gap" between Historic Costs and Forward-Looking TSLRIC*, submitted in FCC CC Docket 96-98, May 30, 1996 (as Appendix C, Attachment C of AT&T Reply Comments).

<sup>19</sup> *Id.* In addition, under the rate-of-return regime, local exchange carriers had strong financial incentives to overinvest in their capital asset base, both because they were insulated from investment risks by the regulatory process itself, and because aggregate earnings were a function of aggregate net investment. See Averch, Harvey and Johnson, Leland, "Behavior of the Firm under Regulatory Constraint," *American Economic Review*, Volume 52, No. 5, 1962. See also California PUC, Consolidated Dockets Nos. I.87-11-033 *et. al* and A.87-01-002, *Re Alternative Regulatory Frameworks for Local Exchange Carriers*, Decision 89-10-031, October 12, 1989, 33 CPUC 2d 43, at 44 (where an identified goal of "incentive regulation" was to diminish or abolish the so-called "A-J Effect" by fracturing the tie between revenues and costs); *In the Matter of Policy and Rules*

emerge (if at all) only gradually, and ILECs will have ample time to adapt their business plans, capital structure, and investment decisions to new market conditions.<sup>20</sup>

A long run incremental cost methodology, in contrast, will help ensure that support levels correspond to the true cost of providing universal service and will thereby encourage competition in rural and other high cost areas and promote efficiency in the provision of universal service.

A cost-based proxy model, as recommended by the Joint Board, can successfully calculate the relevant forward looking costs and further Congress's universal service goals if, and only if, the model comports with the Joint Board's reasonableness criteria.<sup>21</sup> The proxy models submitted to date are deficient in this respect.

In previous comments, Ad Hoc supported use of a cost proxy model in general, and of the Benchmark Cost Model (BCM) in particular, as a useful starting point for calculating the size of the universal service support requirement.<sup>22</sup> At that time, however, Ad Hoc presumed that the Joint Sponsors of the BCM would make

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*Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, *Second Report and Order*, October 4, 1990, at 15.

<sup>20</sup> In addition, like all other telecommunications carriers, ILECs will *benefit* from a pro-competitive regime: They will be allowed to enter previously closed markets and operate with fewer regulatory burdens. Like all other competitive businesses, however, they will also have to bear the risk that they may not recover their investments. A universal service support system that offers incumbents economic protection that their competitors do not enjoy would only frustrate Congress's competitive neutrality objectives and thwart emerging competition in its tracks.

<sup>21</sup> See Recommended Decision at ¶ 277.

<sup>22</sup> Ad Hoc Reply Comments in CC Dkt. 96-45 (filed May 7, 1996) ("Ad Hoc Reply Comments") at 9-11.

adjustments to the BCM in response to criticisms of the model by numerous parties, including Ad Hoc.<sup>23</sup>

Sprint and US West submitted a revised BCM -- the so-called BCM2, which incorporates a number of suggestions made by various parties; however, subsequent analysis of the BCM2 has revealed significant flaws. In its present form, that model does not produce the least-cost, most efficient, forward-looking costs of basic exchange service. Therefore, its use would result in a substantial overstatement of the appropriate universal service funding obligation.<sup>24</sup>

AT&T and MCI also submitted a study -- the Hatfield 2.2, Release 1 -- and a revised version of the model -- Hatfield 2.2, Release 2 -- against which the results of the BCM and BCM2 can be compared. As the Joint Board noted, "the [BCM2 and Hatfield] models produce significantly different estimates of the nationwide total amount of support required to maintain the provision of the supported services in high cost areas."<sup>25</sup> More specifically, the Joint Board found that the BCM2 proposes a required support level (at a \$20 benchmark) of \$14.6 billion nationwide -- approximately \$9.3 billion more than the Hatfield model's \$5.3 billion result. This discrepancy is both striking and troubling, particularly given that the present level of high cost support is less than \$1 billion.

The results of the BCM2 suggest that ILECs would receive billions of dollars of unnecessary funding (and/or funding that reflects embedded cost recovery)

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<sup>23</sup> *Id.* at 10.

<sup>24</sup> See NCTA Cost Model Comments, CC Dkt. No. 96-45 (filed August 9, 1996), Attachment A, "Converging on a Cost Proxy Model for Primary Line Basic Residential Service: A Blueprint for Designing a Competitively Neutral Universal Service Fund," Susan M. Baldwin, Lee L. Selwyn (August 1996).

<sup>25</sup> Recommended Decision, Appendix F at F-7.



when the new high cost fund is established. Such excessive levels of funding would be a huge windfall for ILECs, and therefore would greatly disadvantage new entrants seeking to compete with the ILECs for high cost and low income customers. Accordingly, Ad Hoc urges the Commission to evaluate carefully and adjust, as necessary, proposed cost proxy models to ensure that the model the Commission ultimately adopts clearly satisfies the Joint Board's recommended criteria and the fundamental competitive neutrality objectives of the Act.

**B. The Commission Should Take Further Comment  
On The Cost Proxy Model It Should Select Following  
The Upcoming Cost Workshops.**

The record compiled to date on the cost proxy models proposed by various parties is wholly inadequate to enable commenters to provide useful insights, much less to endorse one model over others. As discussed above, the cost proxy model is the linchpin of a reformed universal service support system. The model selected will either help rationalize expenditures on universal service support and bring them closer to cost, or it will facilitate the annual wasting of billions of dollars. Regrettably, as the Joint Board recognized, none of the models submitted in this proceeding thus far is sufficiently developed to allow parties to make a fully informed, well reasoned selection among the competing models.

The Joint Board has recognized the need for more information, as it has announced two days of workshops on proxy cost models in January, 1997.<sup>26</sup>

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<sup>26</sup> Public Notice, DA-96-2091 (released December 12, 1996).

Although the Commission has solicited comments prior to the workshops, it should establish a short comment and reply comment period after the workshops close but before a model is chosen. This additional comment period would give the public a full and fair opportunity to remark on the events that transpire at the workshops, thus greatly enhancing the value of the workshops.

**C. Revenues From All Other Services Linked To Residential Access Lines Should Be Included In A Revenue-Based Benchmark, Including Local, Discretionary, And Access Services As Recommended By The Joint Board, As Well As Revenues From Yellow Pages Advertising.**

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The Joint Board recommends adoption of a revenue benchmark based on revenues from *all* local, access, and discretionary services (expressed on a per-line basis), where these services are tied to the purchase of supported services, and the cost of the facilities used to provide the supported services are included in the proxy models.<sup>27</sup> In earlier comments, Ad Hoc strongly endorsed this approach, arguing that subscribers do not buy a single rate element, but instead buy (at an aggregated price) a package of services, including multiple elements, such as touch tone dialing, custom calling or "class" services, local usage, directory assistance or extended area calling services, and the contributory elements of access charges. In turn, these service packages produce a revenue stream for the local exchange carriers ("LECs") or competitive LECs ("CLECs"), beyond the revenues from providing core universal services. As the Joint Board properly concluded, when assessing the extent to which universal service support may be

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<sup>27</sup> Recommended Decision at ¶¶ 310-312.

required, the Commission must consider all revenues that flow from the entire services package residential customers purchase when they buy a dial-tone line.<sup>28</sup>

The Joint Board did not, however, address Ad Hoc's proposal that yellow pages revenues be included in the benchmark model.<sup>29</sup> This component is integral to the establishment of a competitively neutral universal service support mechanism as contemplated by the Act.

Yellow pages advertising revenues have long been used as a source of financial support for the below-cost pricing of basic local exchange telephone service, as reflected in the Divestiture Court's decision to permit the Bell Operating Companies ("BOCs") to retain the yellow pages business.<sup>30</sup> In addition, Yellow pages revenues are linked to basic residential telephone service because much of the yellow pages' value results directly from the near universal local connectivity derived from an ILEC's historic ubiquity.<sup>31</sup> Since divestiture, nothing -- including the passage of the Telecommunications Act of 1996 nor the promise of competition in local telephone markets -- has broken this fundamental link or diminished the monopoly positions of the ILECs in yellow pages advertising, which results from their historic local exchange monopoly.

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<sup>28</sup> Ad Hoc Comments at 17.

<sup>29</sup> Recommended Decision at ¶ 307 (citing Ad Hoc Comments at 13).

<sup>30</sup> See *U.S. v. AT&T*, 552 F. Supp. 131, 193-194 (D.D.C. 1984); see also *U.S. v. Western Electric Co.*, 592 F. Supp. 846, 865 (D.D.C. 1984) (where the court confirmed that "it assumed that revenue from directory advertising would continue to be included in the rate base of the [Bell] operating companies, providing a subsidy to local rates.") Ad Hoc Comments at 14-15. As noted therein, the magnitude of the yellow pages subsidy is quite substantial -- in some states, amounting to as much as \$4 per month per residential line. *Id.* at 16, note 24.

<sup>31</sup> Ad Hoc Comments at 15-16.

For these reasons, it is economically appropriate and sound as a matter of policy for the Commission to require that the substantial profits from yellow pages advertising continue to be used to support universal service. Explicit recognition of yellow pages revenues is consistent with the Joint Board's recommendation that total revenues, including "local, discretionary, access services, and others as found appropriate,"<sup>62</sup> be used in determining the level of the revenue benchmark and, ultimately, the amount of universal service support a carrier should receive.

There is an important distinction, however, between yellow pages revenues and revenues from other services associated with the dial-tone line. Unlike revenues from discretionary and access services, yellow pages revenues do not follow the customer when the customer takes service from a new entrant. Thus, while yellow pages revenues are a relevant and substantial source of subsidy for universal service funding and wholly appropriate for inclusion in a revenue benchmark applicable to incumbent LECs, new entrants would be unfairly disadvantaged by the inclusion of yellow pages revenues in the revenue benchmark. Unlike the ILECs, new entrants would not have access to this source of subsidy to offset the cost of serving high cost or low income customers. On the other hand, excluding yellow pages revenues from the revenue benchmark would result in a massive windfall to the ILECs that could create significant barriers to entry for new entrants who will have to compete with the ILECs on the basis of price.

The compromise solution that best furthers the goal of competitive neutrality, and which Ad Hoc urges the Commission to adopt, is the establishment

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<sup>32</sup> Recommended Decision at ¶ 310.

of two separate revenue benchmarks -- one that includes yellow pages revenues and applies only to incumbent LECs, and another that excludes yellow pages revenues and applies only to new entrants. In this way, the Commission can prevent the ILECs from unfairly using the traditional subsidy source of yellow pages revenues to enhance their competitive position in the residential dial-tone market at the expense of new entrants and high cost/low income subscribers.

### III. THE COMMISSION SHOULD CLARIFY THE TYPES OF ENTITIES AND ACTIVITIES THAT ARE SUBJECT TO UNIVERSAL SERVICE CONTRIBUTION OBLIGATIONS

The 1996 Act identifies a "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."<sup>33</sup> In the Senate Conference Report to the 1996 Act, Congress further defines a "telecommunications service" as that set of "services and facilities offered on a 'common carrier' basis, *recognizing the distinction between common carrier offerings that are provided to the public . . . and private services.*"<sup>34</sup> The Commission should clarify that the universal service support requirements will apply to telecommunications service providers and other service providers in a manner consistent with this definition.

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<sup>33</sup> 47 U.S.C. § 153(46).

<sup>34</sup> Joint Statement of Managers, S. Conf. Rept. No. 104-230, 104<sup>th</sup> Cong., 2d Sess. 115 (1996) ("Joint Statement") (cited in Recommended Decision at ¶ 779) (emphasis added).

A. The Commission Should Clarify That Private Carriers Are Not Subject To The Contribution Requirements Except To The Extent These Carriers Offer Interstate "Telecommunications Services."

The Joint Board recommends that "entities that provide telecommunications that meet the entity's internal needs or that are provided free-of-charge" should not be required to contribute to universal service support mechanisms,<sup>35</sup> except "to the extent" these entities "offer interstate telecommunications services, they will be required to contribute to support mechanisms."<sup>36</sup>

Ad Hoc urges the Commission to clarify that the Board means that a private carrier's contribution requirement is triggered only where it provides "interstate telecommunications services," *i.e.*, interstate services provided on a common carrier basis, and that its contribution will be limited to a percentage of the revenue it earns from such services.

This interpretation is consistent with both the common law and the 1994 CMRS Second Report and Order,<sup>37</sup> which the Joint Board cites, where the Commission distinguished between CMRS providers (who, for profit, provide telecommunications service "directly to the public" or "effectively available to a substantial portion of the public") and non-CMRS providers (who provide a

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<sup>35</sup> Recommended Decision at ¶ 794.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at ¶ 788, citing *Implementation of Sections 3(n) and 332 of the Communications Act*, Second Report and Order, FCC 94-31, 9 FCC Rcd 1411 (1994) ("CMRS 2d R&O").

service “exclusively for internal use or . . . only to a significantly restricted class of eligible users”).<sup>38</sup> This distinction accords with the Joint Board’s conclusion that entities that provide telecommunications services solely for internal use, and not “directly to the public” are not “telecommunications service providers” and are therefore exempt from the universal service support contribution requirements.<sup>39</sup>

The CMRS 2d R&O also comports with the common law. The CMRS 2d R&O points to two prerequisites that must be met for mobile service interconnected with the public switched network to be considered common carriage and therefore “commercial mobile radio service”: the service must be provided (1) for profit<sup>40</sup> and (2) to the public or such classes of eligible users as to be effectively available to a substantial portion of the public.<sup>41</sup> Likewise, the U.S. Court of Appeals has construed the *common law* concept of common carriage as follows:

[T]he critical point is the quasi-public character of the activity involved. What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier ‘undertakes to carry for all people indifferently . . . .’<sup>42</sup>

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<sup>38</sup> CMRS 2d R&O, 9 FCC Rcd. at 1440.

<sup>39</sup> Ad Hoc notes, however, that to the extent the Commission finds any inconsistency between the CMRS 2d R&O and the 1996 Act in this regard, the Commission must defer to the 1996 Act. There, Congress makes clear that private carriers are not telecommunications service providers and are not subject to the universal service requirements.

<sup>40</sup> CMRS 2d R&O, 9 FCC Rcd. at 1427-1428.

<sup>41</sup> *Id.* at 1437-1438. Note that the Commission correctly decided that not-for-profit sharing arrangements can be exempted from common carrier treatment.

<sup>42</sup> *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir.) (“NARUC I”) (footnote and citations omitted), *cert. denied*, 425 U.S. 992 (1976).

The Court explained, however, that

[t]his does not mean a given carrier's services must practically be available to the entire public. One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population.<sup>43</sup>

In contrast, the Court explained that "[a] carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal."<sup>44</sup>

The Recommended Decision requires some clarification on this point. Section 254(d) of the Act, 47 U.S.C. § 254(d), permits the Commission to require "any other provider of telecommunications" to contribute to universal service support, if the public interest so requires. The Joint Board has stated that entities that provide *telecommunications*, rather than *telecommunications services*,<sup>45</sup> operate as private carriers, not common carriers. For this reason, the Board has recommended that providers of *telecommunications* for their own internal needs or for free should not be required to contribute to universal service support.<sup>46</sup> The Joint Board goes on to observe that, to the extent providers of telecommunications furnish *interstate telecommunications service* (that is, on a common carrier basis), they should be required to contribute to universal service support, to the extent of their revenues earned from the provision of such

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<sup>43</sup> NARUC I, *supra*, 525 F.2d 641 (footnotes and citations omitted).

<sup>44</sup> NARUC I, *supra*, 525 F.2d 641.

<sup>45</sup> *I.e.*, interstate telecommunications services provided for a fee to the public or to such classes of users as to be effectively available directly to the public. See 47 U.S.C. § 153(46).

<sup>46</sup> Recommended Decision at ¶ 794.



interstate telecommunications services. Ad Hoc submits that the Commission should clarify that such entities would not be required to make universal service contributions based on revenues they may earn from other operations, including the provision of telecommunications. If providers of interstate telecommunications services (*i.e.*, on a common carrier basis) are not required to contribute based on their non-common carrier revenues (such as from video operations), non-telecommunications services providers should not be required to contribute except to the extent that they offer interstate telecommunications services on a common carrier basis.

Curiously, the Joint Board has left a gap in its discussion of various categories of service providers.

In Paragraphs 788-89, the Board observes that providers of telecommunications services (*i.e.*, on a common carrier basis) – whether they furnish such services on a wholesale, retail, or resale basis – should be required to contribute to universal service. Moreover, even not-for-profit entities would be required to contribute if they provide telecommunications services for a fee, *i.e.*, for something of value, including money.

In Paragraph 794, the Joint Board observes that other providers of telecommunications should not be required to contribute to universal service, except to the extent of their telecommunications common carrier operations. It illustrates the types of providers it has in mind by referring to providers of *telecommunications* for their own internal needs or for free.

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